Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIAM R. CROW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. MAY A DISTRICT COURT REFUSE TO EVEN CONSIDER CROW'S ATTEMPTS TO PLEAD GUILTY TO FOUR OF SIX COUNTS IN AN INDICTMENT BY REFUSING TO EXERCISE ANY DISCRETION AND BY IGNORING RULE 11 CONSTITUTIONAL SAFEGUARDS?

II. MAY THE INDICTMENT AND COURT INSTRUCTIONS CONCERNING COUNT FOUR SUBSTITUTE "BELIEF" FOR "KNOWING AND INTENTIONAL" IN DESCRIBING CROW'S MENTAL STATE AS TO A "MINOR" UNDER 18 U.S.C. § 2251(a), PARTICULARLY WHEN CROW ONLY DEALT WITH AN ADULT OVER THE INTERNET, AND, IF NOT, DOES THIS ASPECT OF THE INDICTMENT AND COURT INSTRUCTIONS FAIL TO STATE AN OFFENSE ABSENT EVIDENCE OF ACTUAL EXPLOITATION OF A "MINOR"?

III. IN AN ATTEMPTED EXPLOITATION-OF-CHILDREN PROSECUTION, 18 U.S.C. § 2251(a) AND (d), DO JURY INSTRUCTIONS WHICH FAIL TO INCLUDE THE LAW ON ATTEMPT DEPRIVE CROW OF A FAIR TRIAL AND VALID VERDICT?

IV. DO JURY INSTRUCTIONS WHICH FAIL TO REQUIRE THE STATUTORY ELEMENT THAT THE DEFENDANT MUST KNOW THE INDIVIDUAL INVOLVED WAS A MINOR, DEPRIVE CROW OF A FAIR TRIAL AND A VALID VERDICT WHEN HIS DEFENSE WAS LACK OF SUCH KNOWLEDGE, IN A PROSECUTION FOR KNOWINGLY RECEIVING A PORNOGRAPHIC VISUAL DEPICTION OF A CHILD UNDER 18 U.S.C. § 2252(a)(2)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, William R. Crow, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 4, 1999.

OPINION BELOW

The opinion of the United States Court of Appeals is reported at 164 F.3d 229. It appears in the Appendix at App. 1. The district court issued no opinion in this case.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on January 4, 1999. A timely petition for rehearing was denied on February 10, 1999. This petition for certiorari is therefore due on or before May 11, 1999, and is being timely filed without request for extension of time. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

18 U.S.C. § 2251(a) at App. 25.

18 U.S.C. § 2252(a)(2) at App. 26.

FED. R. CRIM. P. RULE 11 at App. 27.

STATEMENT OF THE CASE

A grand jury indicted Petitioner William R. Crow (Crow) on October 17, 1996. In counts one, two, and three he was charged with interstate shipment of visual depictions of minors engaged in sexually explicit conduct, all violations of 18 U.S.C. § 2252(a)(1)(B); in count four, with attempted sexual exploitation of a minor, a violation of 18 U.S.C. §§ 2251(a) and (d); in count five, with receipt of interstate shipment of visual depictions of minors engaged in sexually explicit conduct, a violation of 18 U.S.C. § 2252(a)(2); and in count six, with possession of three or more visual depictions of minors engaged in

sexually explicit conduct, a violation of 18 U.S.C. § 2252(a)(4).

At the pre-trial hearing, and again during the trial, Crow made known to the district court his desire to plead guilty to counts 1, 2, 3, and 6, while pleading not guilty to counts 4 and 5. The court refused to allow Crow to engage in such a plea procedure and proceeded to trial as if Crow were pleading not guilty to all six counts. The jury was instructed in accord with the notion that Crow had pleaded not guilty to all counts. The jury convicted Crow on all counts.

On September 11, 1997, Crow was sentenced to concurrent 97-month sentences on counts one through five, along with a concurrent 60-month term on count six, followed by three years of supervised release. Crow was also ordered to pay a $12,500.00 fine. The judgment was entered on September 19, 1997, and notice of appeal was timely given.

REASONS FOR GRANTING THE WRIT

I. MAY A DISTRICT COURT REFUSE TO EVEN CONSIDER CROW'S ATTEMPTS TO PLEAD GUILTY TO FOUR OF SIX COUNTS IN AN INDICTMENT BY REFUSING TO EXERCISE ANY DISCRETION AND BY IGNORING RULE 11 CONSTITUTIONAL SAFEGUARDS?

Rule 11 of the Federal Rules of Criminal Procedure requires that the district court insure that the defendant voluntarily and knowingly enters his plea of guilty. The court must make specific inquiries. The core concerns of

Rule 11 are whether the plea was coerced; whether the defendant understood the nature of the charges; and whether the defendant understood the consequences of his plea. *See generally McCarthy v. United States*, 394 U.S. 459 (1968); *United States v. Bernal*, 861 F.2d 434 (5th Cir. 1988).

In the present case Crow sought to plead guilty to four of the six counts of his indictment but not guilty to the remaining counts. The district court refused to allow him to follow this chosen course for the bare and simple reason that the course chosen did not comport with standard procedure, and the Court did so without inquiry as to Crow's knowledge and understanding of his guilty pleas to four of the counts. This decision by the district court amounted to a fundamental disruption of FED.R.CRIM.P. 11 and its purposes, designed to bring Fifth Amendment due process to guilty pleas.

This issue – whether a district court must make inquiry under Rule 11 when a defendant attempts a partial plea of guilty – is an important question of federal law, incorrectly decided by the Court of Appeals for the Fifth Circuit, which has not been, but should be, decided by the Supreme Court.

During a pretrial hearing, Crow expressed his desire to plead guilty to four counts of the indictment (counts 1, 2, 3, and 6) and not guilty to the two other counts (counts 4 and 5). The prosecutor objected, clearly joining the issue. App. 32-33. The district court made clear his intent not to allow Crow to enter his pleas to the various counts in the manner in which he desired. App. 34.

In the opening statement of Crow's attorney, and again during's Crow's testimony, Crow manifested his intent and belief that he was entering pleas of guilty to four of the six counts contained in the single indictment presented in this case. App. 36, 37-39. In so doing, he effectively pleaded not guilty to two of those counts, and he clearly articulated pleas of guilty to the other four – counts 1, 2, 3, and 6. There was no formal plea to the six counts at the beginning of the trial.

The district court treated the case as if all six counts were pleas of not guilty, as the court made clear it would do during the hearing on pretrial motions. App. 32-35. Accordingly, the court failed to follow Rule 11 of the Rules of Criminal Procedure with respect to the four counts to which guilty pleas were entered. The Government presented its full case as to the latter four counts, and these counts were presented to the jury as if Crow had pleaded not guilty to them.

Despite his unequivocal admissions of guilt to the four counts, Crow was treated at sentencing as if he had not accepted responsibility for the four counts.

The district court erred by completely failing to inquire into the core considerations of Rule 11 with respect to the counts 1, 2, 3, and 6, thus eliminating the mandatory judicial inquiries expressly designed to determine whether a knowing and voluntary plea of guilty was made as to the four counts.

The Court of Appeals held that "Rule 11 was not triggered because the district court never accepted a plea of guilty from Crow," and that the district court acted within its discretion by submitting the issue of guilt as to

the four counts to the jury instead. *United States v. Crow*, 164 F.3d 229, 233 (5th Cir. 1999); App. 8-9. The Court of Appeals endorsed the Government's argument that Crow's partial guilty plea amounted to an implied request for a severance of counts. *Crow*, 164 F.3d at 233-234. As "Crow failed to assert any ground for severance[,] *United States v. Ballis*, 28 F.3d 1399, 1408 (5th Cir.1994)[,]" 164 F.3d at 234, the court found no abuse of discretion. Any discussion of severance in this case is a subterfuge that obfuscates the true issue before the Court.

While no defendant has an absolute right to have the district court accept a guilty plea (each case presenting differing circumstances), every defendant is entitled to fair consideration and the exercise of sound discretion by the district court in determining whether to accept or reject a guilty plea. In the event the guilty plea is rejected, the district court should articulate sound reasons for its decision. *United States v. Wild*, 92 F.3d 304 (5th Cir. 1996); *United States v. Moore*, 916 F.2d 1131 (6th Cir. 1990); *United States v. Shepherd*, 102 F.3d 558 (D.C. Cir. 1997).

The actions of the courts below are an absolute subversion of the truth-seeking function of the judiciary. By refusing to allow Crow to plead guilty to some counts and not guilty to others, the district court forced him into a choice between two lies – either plead guilty to two counts of which he believed himself not guilty or, as was forced upon him here, plead not guilty to four counts of which he felt himself guilty.

These assertions assume that, by his intended pleas, Crow was presenting the district court with what he believed, without guile, to be the truth. Crow recognizes

that some may question such assertions, for the courts have become accustomed to litigants in the adversary system who present a view of the facts that is not entirely objective.

Crow's situation presents an exception to the distorting self-interest projected by many litigants, both civil and criminal. In a case in which lengthy penitentiary time loomed over every count of his indictment, he virtually begged to plead guilty to four of six counts of that indictment and persisted in his attempts to do so. His position in this respect was simple – he wanted to proceed and even testify in the trial in conformity with what he perceived to be the truth, even at the undoubted expense of subjecting himself to significant time in a federal correctional facility.

Because Crow's mixed-plea attempt was so clearly contrary to his own interests, it should have been the subject of a Rule 11 inquiry. Because of the apparent conflict in Crow's pleas to the various counts of his indictment, the district judge should have found it absolutely necessary to bring the case to a halt until he made a careful inquiry into the voluntariness of the plea. This Court should take certiorari and so hold.

The prosecutor and the courts below disavowed the need for such an inquiry, however, because, in their view, it would have disrupted the regular procedure of the district court. This is a questionable conclusion. Crow's four guilty pleas could have been carried through the trial, and the district court could have simply informed the jury in its charge that Crow was pleading guilty to

these four allegations, then proceeded to the two remaining counts in the charge.

The failure to follow such a procedure, the failure to allow Crow a mixed plea, violated the core considerations protected by Rule 11.

Indeed, Crow contends that the course followed by the district court and endorsed by the Court of Appeals disrupted the proceedings significantly more than would have been the case if the district court had pursued the procedures set out in the second preceding paragraph, above. What the district court did here, in part by omission, was not only to deprive Crow of a meaningful inquiry into his guilty pleas – but also to taint his trial on the two remaining counts as well. This occurred at the very least in the sentencing hearing. Had the district court properly treated Crow as one who was accepting responsibility for the acts alleged in four counts of the indictment, and as honestly disputing the remaining counts, his decision on this issue at sentencing might well have benefitted Crow on all six counts.

For these reasons, certiorari should be granted to address these important issues implicating Rule 11 of the Federal Rules of Criminal Procedure.

II. MAY THE INDICTMENT AND COURT INSTRUCTIONS CONCERNING COUNT FOUR SUBSTITUTE "BELIEF" FOR "KNOWING AND INTENTIONAL" IN DESCRIBING CROW'S MENTAL STATE AS TO A "MINOR" UNDER 18 U.S.C. § 2251(a), PARTICULARLY WHEN CROW ONLY DEALT WITH AN ADULT OVER THE INTERNET, AND, IF NOT, DOES THIS ASPECT OF THE INDICTMENT AND COURT INSTRUCTIONS FAIL TO STATE AN OFFENSE ABSENT EVIDENCE OF ACTUAL EXPLOITATION OF A "MINOR"?

Count four of the indictment charged Crow with a violation of 18 U.S.C. § 2251(a) without alleging that Crow enticed a minor or knew that he was enticing a minor. These omissions were repeated in the charge, without objection by Crow's trial counsel. The Government's evidence tended to show that the person communicating with Crow (a male police officer in Florida) held himself out to be a minor female while communicating with Crow on the Internet.

Section 2251(a) makes it an offense only if a person entices a "minor." The statute does not proscribe conduct where one merely *believes* someone to be a minor. When one does not entice a "minor" (and no minor was involved in this case), no offense has been committed. The Court of Appeals failed to address this issue, an oversight that should be corrected by this Court.

It is clear that the difficulty with this issue is the absence of a scienter or *mens rea* requirement in the statutory language of section 2251(a), which was not drafted with the Internet in mind. However, according to

this Court's decision in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), a scienter element is required in count four. The Courts below failed to acknowledge such a requirement. As a consequence, the jury was not required, by indictment or charge, to find the necessary mental element of the offense.

The Court of Appeals concluded that this mental element was satisfied by the "belief" language used by the district court in its charge, which required the jury to find that Crow believed the person he was enticing was a minor. *Crow*, 164 F.3d at 236. However, this language was insufficient because it failed to measure up to the scienter element clearly required under the law. It was clear and harmful error in violation of the Fifth and Sixth Amendment to the United States Constitution for the district court to allow Crow's jury to find him guilty of count four without finding that his conduct was knowingly or intentionally done. This contention, and the scienter issue it raises under section 2251(a), warrants review and consideration as a successor to this Court's decision in *X-Citement Video*.

III. IN AN ATTEMPTED EXPLOITATION-OF-CHILDREN PROSECUTION, 18 U.S.C. § 2251(a) AND (d), DO JURY INSTRUCTIONS WHICH FAIL TO INCLUDE THE LAW ON ATTEMPT DEPRIVE CROW OF A FAIR TRIAL AND VALID VERDICT?

Although Crow was charged with attempted exploitation of children, the Court's instructions never explained or submitted the law of attempt to the jury. The jury could therefore never find specific intent to commit

the substantive offense and proof of substantial steps toward commission of the crime. *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976). This error is not one of degree but rather one of substance, *i.e.*, the entire omission of the law of attempt when Crow was prosecuted for and "attempted" crime. Thus, the Government's proof was lessened and the jury was prevented from returning a true verdict on the only relevant issue, attempt. This violated the Fifth and Sixth Amendments to the United States Constitution.

IV. DO JURY INSTRUCTIONS WHICH FAIL TO REQUIRE THE STATUTORY ELEMENT THAT THE DEFENDANT MUST KNOW THE INDIVIDUAL INVOLVED WAS A MINOR, DEPRIVE CROW OF A FAIR TRIAL AND A VALID VERDICT WHEN HIS DEFENSE WAS LACK OF SUCH KNOWLEDGE, IN A PROSECUTION FOR KNOWINGLY RECEIVING A PORNOGRAPHIC VISUAL DEPICTION OF A CHILD UNDER 18 U.S.C. § 2252(a)(2)?

Count five of the indictment charged Crow with violating 18 U.S.C. § 2252(a)(2), banning the knowing receipt of a visual depiction, mailed in interstate commerce, of a minor engaged in sexually explicit conduct. The jury charge on this count did not require the jury to find that the "knowledge" element of this statute applied fully and constitutionally to Crow's conduct; it did not clearly or explicitly require the jury to find that *Crow knew* the person depicted in the film was a minor. Crow did not object to this charge at trial.

The Court of Appeals, ignoring *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) and *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), held that although the jury charge was less than ideal, it did not amount to plain error. 164 F.3d at 236-237. In so holding, the Court of Appeals paid little or no heed to the closely contested nature of the trial on this count or to the strong nature of Crow's own testimony on the point. It relied on no holding of this Court, because, as yet, there is none.

This issue melds two developing issues of law: the knowledge requirement for a crime that is increasingly being prosecuted in the federal courts, and the effect of blind Internet access to purported information about other Internet users which affects that knowledge requirement.

The faulty instructions in this count lessened the Government's burden of proof and essentially rendered Crow's defense of lack of knowledge irrelevant to the jury's determination of the knowledge element. Here the jury charge violated the Fifth and Sixth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, Crow respectfully requests that the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit issue, that the decision in this case be vacated, and that the judgment of conviction be reversed and the cause remanded for a new trial.

Respectfully submitted,

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APPENDIX I

UNITED STATES of America, Plaintiff-Appellee,

v.

William R. CROW, Defendant-Appellant.

No. 97-50780.

United States Court of Appeals,
Fifth Circuit.
Jan. 4, 1999.
Rehearing Denied Feb. 10, 1999.

Joseph H. Gay, Jr., U.S. Atty., Margaret Feuille Leachman, San Antonio, TX, for Plaintiff-Appellee.

Kerry P. Fitzgerald, Dallas, TX, David K. Chapman, Fort Worth, TX, for Defendant-Appellant.

Appeals from the United States District Court for the Western District of Texas.

Before REYNALDO G. GARZA, STEWART and PARKER, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

I. Factual and Procedural Background

Chuck Esposito ("Esposito"), a detective with the Clearwater, Florida Police Department, conducted an undercover child sexual abuse and pornography investigation by logging onto various "chat rooms."[1] Esposito

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[1] A chat room is a service provided by Internet service providers, such as America Online Inc., where individuals can correspond with each other simultaneously.

represented himself to be a thirteen year old girl. His screen name was StephieFL and the attached profile revealed, in part, his assumed identity as Stephanie, a single female from Clearwater, Florida, born on January 26, 1983.

On August 8, 1996, Esposito encountered Appellant, William R. Crow ("Crow"), in a "Pre-teen" chat room on the Internet. Crow utilized the screen name VideoDom and his profile indicated that he was a male from Texas whose name was Bill. Crow's profile on the Internet read: "seeking young slender amateur women interested in making very explicit adult videos!" His personal quote stated, "I am very $generous$ if you are good and nasty! Email me for an interview! I travel!"

During their first Internet encounter, Crow engaged StephieFL in sexually explicit conversations.[2] He invited her to trade "nasty stuff" and wanted to know if she ever masturbated while looking at sex pictures or discussing sex on the telephone. When questioned whether girls the same age as herself posed for sex videos, Crow affirmed that they did and stated that he paid girls $300.00 to pose, masturbate and talk really nasty to him. Crow further claimed that he would pay more if the girls actually engaged in sexual acts, including bestiality. StephieFL

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[2] The conversations that Crow had with StephieFL on the Internet are graphic and vulgar. This terminology is generally inappropriate for this Circuit's opinions. However, this Court feels that the facts must be shown as they were presented to the jury, which determined Crow's guilt, and the court, which determined Crow's sentence and ruled on other relevant legal issues.

responded that she did not think she had ever seen $300.00 and sought confirmation that Crow would actually pay. Crow assured StephieFL that other girls had made videos of themselves and mailed them to him and that he is not actually present when the videos are made. Crow emphasized that he paid because failure to pay could mean that he would "lose my girls and my sources . . . it [sic] not worth it to burn a potential good girl for a few hundred dollars." StephieFL ended the conversation by claiming that her mother was yelling at her to help clean.

On August 8, 1996, another conversation via the Internet transpired in a similar fashion. Crow, still using the screen name of VideoDom, invited StephieFL to pose for photographs and videos. In response to StephieFL's question on how he wanted her to pose, Crow sent StephieFL a photograph of a prepubescent girl lying on her back spreading her labia, exposing her genitalia. When asked what else he was doing on the Internet, he responded that he was trading pictures of women sucking horses. He then sent a copy of the pictures to StephieFL. Crow indicated that he had other pictures: "Dogs, zebras, then I also collect lots of anal pics, facial cum shots, piss, poop, fisting, enema, huge toys in cunt and ass, you name it, I have it." Crow asked permission to call StephieFL to verify her identity. When she declined, he gave her a telephone number and hours during which she could call him. Crow asked StephieFL her age and she told him she was "13."

Crow sought to overcome all of StephieFL's reservations about producing such a video and photographs. In addition, Crow continued to seek voice verification.

StephieFL requested more photographs which she received. The majority of the photographs featured pre-pubescent and pubescent girls in sexually explicit poses or engaged in sexually explicit activities, including sexual acts with dogs. Crow also provided StephieFL with instructions on how to encrypt and retrieve files. StephieFL offered numerous excuses for not calling Crow or not producing a tape. The excuses were usually centered around her parents or school. Crow, however, persisted and endeavored to overcome each excuse. Throughout their contact, which occurred via the Internet and e-mail, Crow continued to provide StephieFL with sexually explicit photographs of pre-pubescent and pubescent girls while requesting voice verification.

In late September of 1996, StephieFL had secured a mailing address and informed Crow that she had forwarded a video. A twenty-nine year old secretary for the Midland, Texas Police Department phoned Crow at his place of employment, identified herself and left a message for him. A receptionist left the message on Crow's desk. United States Postal Inspector Ron Massey arranged a controlled delivery of a videotape to Crow. The video tape, which Massey had received from the Dallas Police Department, presented a young female performing the type of sexually explicit conduct Stephanie had described recording for Crow. On September 30, 1996, Crow was arrested as he left the post office with the videotape.[3]

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[3] A subsequent search of Crow's office and house revealed a plethora of child pornography, adult pornography and bestiality, including the images appellant had sent to

On October 17, 1996, the grand jury returned a six count indictment against Crow. Counts one, two and three charged him with interstate shipment of visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(1)(B). Count four charged attempted sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a) and (d), while count five charged Crow with receipt of interstate shipment of visual depiction of minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2). Finally, count six alleged possession of three or more visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4).

At trial, Crow admitted to using the name VideoDom to send, via interstate commerce, the visual depictions of minors engaged in sexually explicit conduct as alleged in counts one, two and three. Crow also admitted to possessing three or more visual depictions of minors engaged in sexually explicit conduct as alleged in count six. Crow admitted guilt to those counts, but maintained his innocence with regard to counts four and five. A jury convicted Crow on all counts.

On September 11, 1997, Crow was sentenced to ninety-seven months imprisonment on counts one through five, and to a concurrent sixty months imprisonment on count six. A fine and supervised release were imposed. On September 19, 1997, the trial court entered its judgment. This appeal followed.

StephanieFL. Additional images were found depicting sexual bondage of children and sexual activity between men and young girls.

II. Discussion

a. Rule 11

Rule 11 of the Federal Rules of Criminal Procedure is triggered when the district court accepts a plea of guilty. *See United States v. Suarez*, 155 F.3d 521, 524-25 (5th Cir.1998). Rule 11 establishes the procedure that a court must follow prior to accepting a plea of guilty. *United States v. Myers*, 150 F.3d 459, 464 n. 8 (5th Cir.1998). The district court, however, is not under an obligation to accept a defendant's confession of guilt. *Lynch v. Overholser*, 369 U.S. 705, 719, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962).

Rule 11 is designed to ensure that the plea is voluntary, accurate and properly recorded. Fed.R.Crim.P 11(d), (f) & (g). "The court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands . . . the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, . . . any special parole or supervised release term, . . . any applicable sentencing guidelines, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense." *Id.* at 11(c)(1). The district court must also inform the defendant that any answers to questions posed by the court may be used against the defendant in a prosecution for perjury or false statement. *Id.* at 11(c)(5).

Crow argues that the district court failed to follow Rule 11's procedural prerequisites and that the failure to address Rule 11's "core concerns" requires an automatic

reversal. Crow is incorrect. This Circuit has clearly established that Rule 11 challenges are reviewed under a harmless-error analysis. *Suarez*, 155 F.3d at 524. "Under the harmless-error analysis, this Court must determine (1) whether the sentencing court in fact varied from the procedures required by Rule 11 and (2) if so, did such variance affect the substantial rights of the defendant." *Id.* (citing *United States v. Johnson*, 1 F.3d 296, 298 (5th Cir.1993) (en banc)).

At a pretrial motions hearing and during the subsequent trial, Crow admitted guilt to counts one, two, three and six, but maintained his innocence with regard to counts four and five. During the pretrial motions hearing, the prosecution objected to the acceptance of a plea of guilty because the effect would result in a severance of the counts and prevent the prosecution from presenting its case. The court agreed, and it was understood by the parties, that Crow would testify and admit guilt. The government, however, was required to present evidence supporting its entire case. Crow never requested rearraignment, Rule 11 proceedings on the counts at issue, or a severance of counts. The government did not offer a plea agreement for the court's consideration. In addition, the court at the beginning and end of trial, repeatedly instructed the jury on the presumption of innocence, the government's burden of proof, the pending charges, and the elements that the government was required to prove under each count of the six-count indictment. As required, the jury returned a verdict on each of the six counts of the indictment.

This Court finds that the facts in this case do not trigger Rule 11 considerations and therefore we do not

need to engage in a harmless error analysis. Rule 11 was not triggered because the district court never accepted a plea of guilty from Crow. Instead, the district court submitted the issue of guilt as to counts one, two, three and six to the jury. The jury was required to make a finding of guilt beyond a reasonable doubt for each count. Had the court accepted Crow's confession of guilt as a "plea of guilty," it is obvious that it would not have submitted the issue of determining Crow's guilt on all of the counts to the jury.

The government asserts that although Crow never specifically requested a severance, his rearraignment and the court's acceptance of a guilty plea on some of the charges in the indictment would have forced a severance of counts. Therefore, the government maintains that we should apply an abuse of discretion standard to the district court's refusal to sever the counts.

The government is correct in noting that a refusal to sever counts is reviewed only for an abuse of discretion. *United States v. Fisher,* 106 F.3d 622, 631 (5th Cir.1997). We agree with the government that an abuse of discretion is the proper standard of review under the specific facts of this case. Moreover, we hold that the district court did not abuse its discretion because Crow failed to assert any ground for severance. *United States v. Ballis,* 28 F.3d 1399, 1408 (5th Cir.1994). Furthermore, we find that Crow has failed to demonstrate specific and compelling prejudice because he was not held to any of his statements by the court or the prosecutor. This is because the government was required to prove all of the elements of the six charges, the court instructed the jury on the specific

elements of all of the charged offenses, and the jury was asked to return a verdict on all of the charged offenses.

b. Motion to Quash Count Four

We review a district court's ruling on a motion to quash for an abuse of discretion. In re Grand Jury Proceedings, 115 F.3d 1240, 1243 (5th Cir.1997). In addition, this Court reviews the sufficiency of an indictment de novo. *United States v. Cluck,* 143 F.3d 174, 178 (5th Cir.1998).

Crow claims that the allegation charged in count four of the indictment did not satisfy the minimum constitutional requirements because: (1) it failed to state an offense under 18 U.S.C. § 2251; and (2) it failed to state an essential element of the crime requiring that the person exploited through various means must be a "minor." Crow, in challenging the sufficiency of the indictment, focuses on the indictment's phrase "a person whom the defendant believed was a 13 year old female." He contends that the statute requires that the individual exploited or that the defendant attempted to exploit had to actually be a minor.

Section 2251(a) prohibits:

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual

> depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

Subsection (d) provides punishment for "[a]ny individual who violates, or attempts or conspires to violate" this section.

Crow contends that section 2251 should be interpreted to require the individual involved to actually be a minor female, and not merely a person believed to be a minor female. Crow asserts that the indictment is insufficient because the statutory language provides that the person must be a minor and the indictment fails to reflect the statute's intent.

Rule 7 of the Federal Rules of Criminal Procedure requires that an indictment be a "plain, concise and definite written statement of the essential facts constituting the offense charged." In reviewing a challenge to an indictment alleging that it fails to state an offense, the court is required to take the allegations of the indictment as true and to determine whether an offense has been stated. *United States v. Hogue*, 132 F.3d 1087, 1089 (5th Cir.1998). The purpose of an indictment is to inform a defendant of the charges against him and set a predicate for a subsequent invocation of the double jeopardy clause. *United States v. Devoll*, 39 F.3d 575, 578 (5th Cir.1994), *cert. denied*, 514 U.S. 1067, 115 S.Ct. 1701, 131

L.Ed.2d 563 (1995). The test for the validity of an indictment is "not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." *Cluck*, 143 F.3d at 178 (internal citation omitted). Although an indictment must allege each and every element of an offense, "the law does not compel a ritual of words." *Devoll*, 39 F.3d at 579. The validity of an indictment is governed by practical, not technical considerations. *Id.*

The proper test for determining the validity of the indictment is whether or not the defendant has been prejudiced by the alleged deficiency. *United States v. Steen*, 55 F.3d 1022, 1026 (5th Cir.1995), *cert. denied*, 516 U.S. 1015, 116 S.Ct. 577, 133 L.Ed.2d 500 (1995). This Court finds that Crow did not allege, show or suffer prejudice. The allegation charged in count four of the indictment apparently satisfies the minimum constitutional requirements. Moreover, Crow never claimed to be unaware of the government's theory of the case, the nature of the charges against him or that the indictment in some way failed to protect him from future prosecution. In addition, the indictment was sufficiently detailed and clearly presented the charges. Therefore, we hold that the district court did not err by refusing to quash count four.

c. Jury Instructions

Crow challenges the jury instructions on three grounds: (1) attempt in count four; (2) the mens rea and

scienter elements in count four; and (3) the scienter element in count five. We will address each of these issues individually.

Standard of Review

Crow objects to the jury charge for the first time on appeal. Consequently, because no objection was raised below, this Court applies a plain error standard. Fed.R.Crim.P. 52(b); *see Devoll*, 39 F.3d at 579. A plain error must be obvious and clear under current law, affect a substantial right and result in prejudice to the defendant. *United States v. Calverley*, 37 F.3d 160, 163-64 (5th Cir.1994), *cert. denied*, 513 U.S. 1196, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995). The burden of persuasion lies with the appellant; therefore, no remedy is available absent a showing that a substantial right has been compromised. *Id.* Once an error has been presented to the court, the court may nevertheless decline to correct the error. *Id.*

Instruction on Attempt

This Court has adopted a two part test to determine if a defendant is guilty of an attempted crime. *See United States v. August*, 835 F.2d 76, 77 (5th Cir.1987). First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting. Second, the defendant must have engaged in conduct which constitutes a substantial step toward the commission of the crime. *Id.* (citing *United States v. Mandujano*, 499 F.2d 370, 378 (5th Cir.1974), *cert denied*, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975)). A substantial step is conduct

strongly corroborative of the firmness of the defendant's criminal intent. *August,* 835 F.2d at 77.

Crow complains that the district court: (1) did not explain to the jury the law of attempt; (2) failed to explain the difference between mere intent to commit a specific crime and attempt to do so; (3) neglected to instruct on the language concerning a substantial step; and (4) incorrectly stated the criminal charge and the elements that the government needed to prove as to count four. Crow argues that these errors constitute clear error.

We find this Court's analysis in *United States v. Contreras,* 950 F.2d 232, 237 (5th Cir.1991), *cert. denied,* 504 U.S. 941, 112 S.Ct. 2276, 119 L.Ed.2d 202 (1992), illuminates the course we should follow in the case at bar. In *Contreras,* we held that "factual impossibility is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be." *Id.* at 237; *see also United States v. Greer,* 158 F.3d 228, 239 n. 6 (5th Cir.1998) (noting that factual impossibility is not a defense to a charge of attempt). As in *Contreras,* this Court holds that factual impossibility is not a defense to attempt in this case.

This Court finds that there was no plain error. Thus, a miscarriage of justice did not result from the failure to include "attempt" language in the jury charge and the substantial evidence supporting the jury's finding of guilt beyond a reasonable doubt was not overcome. Therefore, we hold that the jury instruction, with regard to attempt, was not fundamentally defective. Crow was properly convicted of attempt because he undoubtedly believed

that the person he was corresponding via the Internet was a minor.

Instruction on Count Four

Crow argues for the first time on appeal, that the court's instruction on the scienter and mens rea elements of section 2251(a) and (d) in count four were inadequate and resulted in plain error. Crow contends that the government was required to show that he actually "knew" that StephieFL was a minor, rather than instructing the jury that it was permitted to convict him if they found he simply "believed" that StephieFL was a minor. Crow asserts that plain error exists because the court failed to instruct the jury on one of the elements of the crime.

Crow asserts that *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994), requires both mens rea and scienter elements as to age; otherwise section 2251 should be declared unconstitutional for lack of a scienter element. The government maintains that Crow's construction of section 2251(a) is erroneous. We find that the government's contention is correct.

In *United States v. United States District Court for the Central District of California*, 858 F.2d 534, 538 (9th Cir.1988), the Ninth Circuit held that under section 2251(a), "a defendant's awareness of the subject's minority is not an element of the offense." The Supreme Court agreed in *X-Citement Video, Inc.*, 513 U.S. at 76 n. 5, 115 S.Ct. 464 where it concluded that producers may be convicted under section 2251(a) without proof that they had

knowledge of age. Moreover, Crow's assertion that section 2251(a) is unconstitutional because it lacks a scienter requirement is meritless. The statute requires proof that the persuasion or inducement of the minor was done so "with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct" and requires proof of a defendant's knowledge that the visual depiction would be transported in interstate or foreign commerce or mailed. In addition, the constitutionality of section 2251(a) has been challenged, upheld and affirmed. *See Gilmour v. Rogerson*, 117 F.3d 368 (8th Cir.1997), *cert denied*, ___ U.S. ___, 118 S.Ct. 1066, 140 L.Ed.2d 126 (1998). Therefore, we find that there was no plain error and that the jury was properly instructed.

Instruction on Count Five

Crow contends that the district court plainly erred in failing to properly and adequately instruct the jury on the scienter element in count five in violation of his Fifth and Six [sic] Amendment rights. Count five alleged a violation of 18 U.S.C. § 2252(a)(2), which makes it a crime to knowingly receive any visual depiction of a minor engaged in sexually explicit conduct via interstate commerce. Crow asserts that the court failed to instruct the jury that he must have known that the individual depicted was a minor as shown in *X-Citement Video, Inc.*, 513 U.S. at 78, 115 S.Ct. 464. In *X-Citement Video, Inc.*, the Supreme Court determined that the use of the term "knowingly" in section 2252 requires proof of the defendant's knowledge that the individual depicted was a minor. *Id.* Moreover, Crow notes our decision in *United*

States v. Kimbrough, 69 F.3d 723 (5th Cir.1995), *cert. denied*, 517 U.S. 1157, 116 S.Ct. 1547, 134 L.Ed.2d 650 (1996), where we approved the submission of instructions regarding a violation of section 2252(a). In *Kimbrough*, those instructions required the jury to find beyond a reasonable doubt "that the defendant knew that at least one of the performers in such visual depiction was a minor." *Kimbrough*, 69 F.3d at 733. Crow asserts that the district court's failure to submit instructions analogous to those in *Kimbrough* resulted in plain error. His rationale is that the jury could have believed Crow's testimony, yet it would have been powerless to find in his favor because the issue of "lack of knowledge" was improperly presented to the jury for consideration and review.

The government concedes that the jury instructions could have been crafted with greater precision thereby requiring that Crow "knew" that the individuals depicted in the pornography were minors. It argues, however, that the instruction does not rise to the level of plain error. The government cites two other circuits in supporting this assertion. *United States v. Gendron*, 18 F.3d 955 (1st Cir.1994), *cert. denied*, 513 U.S. 1051, 115 S.Ct. 654, 130 L.Ed.2d 558 (1994); *United States v. Cedelle*, 89 F.3d 181 (4th Cir.1996).

In *Gendron*, the charge required that the jury find that the defendant "knew the character and nature of the material." *Gendron*, 18 F.3d at 967. The defendant argued that the court's failure to specifically instruct the jury that it had to find that the person depicted was under the age of 18 was plain error. *Gendron*, 18 F.3d at 967-68. The court rejected the defendant's argument and concluded that because the remainder of the charge referred frequently

to children, the jury in all likelihood understood that the word "knew" encompassed age as well as explicit sexual acts. *Id.* at 968.

The government asserts that in this case, as in *Gendron*, the jury was fully aware that the issue was child pornography because the charge repeatedly refers to minors, and the pornography at issue primarily and obviously depicted children. In addition, it asserts that Crow admitted to knowingly possessing and sending photographs depicting children to StephieFL. Moreover, the computer correspondence demonstrated that Crow desired to receive a videotape of thirteen-year-old StephieFL engaging in sexually explicit conduct. The government notes that while the issue is whether Crow knew that the tape depicted minors, the evidence is so overwhelming on this point that it is unlikely that the jury misconstrued the statute and found Crow guilty on an improper theory.

In *Cedelle*, the Fourth Circuit addressed a plain error review of an instruction that affirmatively removed from the jury's consideration knowledge of the minority of the victim. The court found plain error affecting the defendant's substantial rights but exercised its discretion by not correcting the error because the evidence supported the conclusion that the depicted persons were minors. *Cedelle* never argued to the contrary.

The government asserts that in this case the issue was not removed in its entirety from the jury's consideration and, although Crow contended he did not know what to expect when he picked up the videotape, the

error need not be corrected because evidence to the contrary was so overwhelming. This Court agrees with the government. Therefore, we do not find plain error in the court's instructions to the jury.

d. Sufficiency of the Evidence, Counts Four and Five

In evaluating the sufficiency of the evidence, our standard of review is whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Greer*, 137 F.3d 247, 249 (5th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2305, 141 L.Ed.2d 164 (1998). We view the evidence in the light most favorable to the government. *Id.*

Crow asserts identical arguments to those raised in his challenge to the jury instructions. With regard to count four, which charged Crow with attempting to violate section 2251(a) and (d), he challenges his intent to commit the offenses and denies ever believing that StephieFL was a minor. Similarly, Crow challenges count five, which charged a violation of section 2252(a)(2) by asserting that the evidence was insufficient to demonstrate his knowledge of the minority of the individual depicted in the video. We find Crows [sic] contentions to be unpersuasive. The facts and information presented to the jury clearly support Crow's conviction.[4] Crow's arguments

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[4] Crow's initial contact with StephieFL occurred in a "Preteen" chat room and his profile indicated he was seeking a "young slender amateur women interested in making very

presented to this Court derive from not legal, but factual impossibility. Therefore, *Contreras* is applicable and his request for relief must be denied.

When StephieFL failed to provide the video he requested, he said, "I just need to concentrate my time and efforts on girls who actually perform for me and not just make promises." Crow requested that StephieFL perform certain acts on the video but also requested that she talk nasty to him and "use my name a lot." When she told Crow she made the video, he told her he would give her pointers on how to improve her camera work. Crow also

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explicit adult videos." Therefore, the jury could have inferred that Crow was indeed looking for a pre-teenaged girl with whom he could form a relationship of the type he had with StephieFL. In addition, because StephieFL's profile and her own words specifically informed Crow of her age, the jury could have inferred that he knew that she was only 13 years old. Crow's correspondence illustrated his experience with soliciting out child pornography, sex with children and soliciting videos made by children. Crow admitted he sent approximately 80 visual depictions of minors engaged in sexually explicit conduct to StephieFL. Along with each transmission, Crow represented to StephieFL that they were examples of what she could do in the photos or videos she made for him of herself. Crow inquired about the sexual acts they could perform together, and his comments were inappropriate if he was having a discussion with a man. Crow's advice to StephieFL about sex: "guys like nasty girls the best (don't believe what mom says)!!!" reveals his knowledge, intent and belief that he was conversing with a minor. A rational trier of fact could conclude that if Crow was playing a fantasy game with an experienced adult male, there would have been no reason to provide StephieFL with instructions on how to produce a video, manage compressed and encrypted files and to mail the finished product.

said, "Hopefully you get really slutty for me. I (like most men) really like that in women and young girls." A jury could easily find that if Crow did not believe, or intend that StephieFL would produce a video for him, then there would not have been any reason to make these comments.

After receiving a message that "a lady named Stephanie called" and only minutes before he picked up the videotape, Crow told StephieFL that it would be "Hot" and that he would masturbate as he watched it. It is evident that a jury could conclude that Crow's claim that he was playing a fantasy game and that he did not know that he was dealing with a child is not credible in light of his actual statements in the computer correspondence and the fact that he left moments later to retrieve the video from the post office.

e. Calculation of Sentence

Standard of Review

We review the trial court's application of the sentencing guidelines de novo and findings of fact under a clearly erroneous standard. *United States v. Lucas*, 157 F.3d 998, 1000 (5th Cir.1998).

Calculation of Guidelines for Count Four

Crow argues that the district court erred in its calculation of the guidelines in assigning a base level of 25 to count four. Crow maintains the error occurred because U.S.S.G. 2G2.1 and its specific offense characteristics were inapplicable since the offense did not actually involve a

minor. The government correctly asserts that this argument again relates to a factual impossibility defense, which does not provide a defense to the application of sentencing adjustments. *See Contreras*, 950 F.2d at 237.

Application of Adjustment for Distribution

Crow asserts that the sentences for counts one, two, three and five were improperly calculated because the district court granted his objection to the addition of five points for distribution, however, the points were factored into the offense level. Nevertheless, the government correctly notes that the record clearly demonstrates that Crow did receive the benefit of the adjustment. Following the submission of Crow's objections, the probation officer submitted a revised report addressing the changes. The probation officer found meritorious an objection to an adjustment for distribution of the pornography. The revised pre-sentence report then reflected that change and was submitted and relied upon by the district court.

Acceptance of Responsibility

Crow contends that he was entitled to a reduction in points based on acceptance of responsibility since he made it clear that he intended to plead guilty to counts one, two, three and six. Crow states that his communication and testimony provided a benefit to the trial court. This Court "reviews a district court's finding on acceptance of responsibility for clear error but under a standard of review even more deferential than a pure clearly erroneous standard." *United States v. Garcia*, 135 F.3d 951, 956 (5th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2386, 141

L.Ed.2d 752 (1998). We find that both the jury and the court properly rejected Crow's persistent attempt to minimize his conduct and his intent. Similarly, Crow forced a trial on the most serious counts, which itself can preclude any reduction for acceptance of responsibility. *United States v. Lister*, 53 F.3d 66, 72 (5th Cir.1995) (finding no acceptance of responsibility where defendant went to trial and pled guilty after closing arguments). Therefore, the district court did not err in its decision.

Downward Departure

Finally, Crow maintains that the district court erred in refusing to grant his requests for downward departure based upon his post-offense rehabilitation efforts under U.S.S.G. § 3E1.1 and his diminished mental capacity. Crow states that his diminished mental capacity was his compulsion for adult pornography as opposed to child pornography and his addictive behavior. Furthermore, Crow asserts that the district court was empowered to grant these downward departures but declined to do so under the mistaken belief that it did not have the legal authority to do so.

This Court generally will not disturb the sentencing court's discretionary decision not to depart downward from the guidelines. *United States v. Soliman*, 954 F.2d 1012, 1014 (5th Cir.1992). Only if the district court mistakenly believed that the departure was not permitted will this Court review a refusal to grant a downward departure. *Id.*

The district court denied Crow's request for a downward departure based upon his mental capacity by saying, "I also do not grant a downward departure for diminished mental capacity." In addition, the pre-sentencing report specifically recognized diminished mental capacity as a valid ground for departure.

In denying Crow's request for downward departure based upon his post-offense rehabilitative efforts the court stated "I don't find that what you did would allow for a downward departure and so I do not grant a downward departure for remorse and rehabilitative efforts and that motion's overruled." We find that this statement is indicative of the trial court's awareness of its authority to permit a departure and it decision to decline to do so.

Therefore, we will not disturb the district court's discretionary decision to deny Crow's requests for downward departure.

III. Conclusion

For the aforementioned reasons we find that the district court was correct in all respects. Accordingly, the district court's decision is hereby AFFIRMED.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50780

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

WILLIAM R. CROW

Defendant-Appellant

Appeals from the United States District Court for the Western District of Texas, Midland

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ON PETITION FOR REHEARING

(Filed Feb. 10, 1999)

Before REYNALDO G. GARZA, STEWART and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge

APPENDIX III

18 U.S.C. § 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

* * *

(d) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title, imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this chapter or chapter 109A, such individual shall be fined under this title, imprisoned not less than five years nor more than 15 years, or both. Any organization which violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

APPENDIX IV

18 U.S.C. § 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who –

(1) knowlingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * *

APPENDIX V

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appeal, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order the

defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

* * *

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

* * *

APPENDIX VI

* * *

[p. 265] Count Four. That beginning on or about the 8th day of August, 1996, and continuing through and including on or about the 30th day of September, 1996, in the Western District of Texas and elsewhere, the defendant, William R. Crow, also known as VideoDom, did attempt to intentionally and knowingly employ, use, persuade, induce, entice and coerce a person whom the defendant [p. 266] William R. Crow, also known as VideoDom, believed was a thirteen year old minor female to engage in explicitly – in sexually explicit conduct for the purpose of producing visual depictions of that conduct, when the defendant William R. Crow, also known as VideoDom, knew that these same visual depictions of sexually explicit conduct would be transported and mailed in interstate commerce.

In furtherance of this attempt, the defendant, William R. Crow, also known as VideoDom, committed several acts on those dates, including but not limited:

One, telling a person whom the defendant believed was a thirteen year old minor female that the defendant pays money to girls that mail him videos of themselves where they pose and masturbate and spread themselves while they talk really nasty for me.

Two, E-Mailing a computer file bearing the name – BIGDOG.JPG which included an image of an adult woman performing fellatio on a dog; a computer file bearing the name – DOBERMN1.JPG which included an

image of an adult female performing fellatio on a Doberman; a computer file bearing the name #HORSEBL.JPG which included an image of an adult woman performing fellatio on a horse; Etcetera, through number 5. All this in violation of Title 18, United States Code, Section 2251(a) and (d).

Count Five. That on or about the 30th day of [p. 267] September, 1996, in the Western District of Texas and elsewhere, the defendant, William R. Crow, also known as VideoDom, did knowingly and unlawfully receive visual depictions of a minor engaged in sexually explicit conduct that had been mailed and shipped in interstate commerce and the production of the visual depictions involved in the use of a minor engaging in sexually explicit conduct, that is: A U.S. Mail insured parcel containing a VHS videotape labeled "Steph" which had been mailed at the defendant's instructions to "Bill" at Post Office Box 7904 Midland, Texas, which video contains visual depictions of a minor female engaged in sexually explicit conduct. In violation of Title 18, United States Code, Section 2252(a)(2).

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APPENDIX VII

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[p. 36] **MR. MORGAN:** Your Honor, I need to go ahead and let the Court know as well as Mr. Jackson, the only jury issue is going to be counts four and five. The others are going to be guilty pleas.

MR. JACKSON: Well, he can't pick – if – I'm not sure I understand what he's saying. He cannot pick and [p. 37] choose which counts he pleads guilty to and goes to trial on. Now, if he's saying the defendant's going to admit to other stuff and have some explanation, fine. You can't sever counts in an indictment.

THE COURT: Well, I guess you can. I mean, I don't know if – I mean, I always thought you could sever counts –

MR. JACKSON: The Court can. I misphrased it. The defendant can't by pleading.

THE COURT: So, basically – I think what you're just trying to say, basically, you're just going to come in and plead true to – I mean, you're basically going to say, you know, we're not – you know, you can listen to everything else, what we're – what we're concentrating on here is counts, what, four and five did you say?

MR. MORGAN: Yes, sir. I have no problem with the judge – with this Court telling the venire the only issues are counts four and five.

MR. JACKSON: Your Honor, no. You can't – I can't allow that to happen because it puts us in the posture – we have to present evidence on the entire

indictment. Whatever Mr. Morgan represents, says, because when this goes up on appeal, we have to have the record to prove guilt.

THE COURT: That's true.

MR. MORGAN: Sure.

MR. BEERY: I think you can plead guilty in a [p. 38] situation like we had two or three weeks ago. Mr. Jevon Bell, after a jury was selected plead guilty to the indictment. I couldn't stop him from doing that. There's no plea agreement. But when you have multiple counts, I don't think you can cut the Government off or anybody can cut the Government off of presenting the evidence.

THE COURT: Actually, I don't think Mr. Morgan plans to. Do I understand –

MR. MORGAN: Your Honor, I had a case in Upton County with Brock Jones, a district attorney named J.W.A. Johnson. I got court appointed. This man named Albert Armendariz, out of McCamey, an undercover officer from Sweetwater. He made three deliveries of cocaine to her. It was a guilty plea. The D.A., J.W.A. Johnson – he put on his case as if he plead not guilty. He had the chemist come down from Midland, David Lang. He put on the entire case. It was a guilty plea. So, yes, the Government can put on all the evidence and all the counts.

MR. JACKSON: And what we're saying, however, Your Honor, until it is decided by a jury, it is, technically, contested and any comment from the Court otherwise puts us in the position of we're the ones who have – are bringing this before you –

THE COURT: I think you would be – Let's talk about this a little bit. I think – I don't plan to make any [p. 39] comment. As far as I'm concerned, I mean, I'm not going to say, ladies and gentlemen, you should find the defendant guilty of counts one, two, three, and six. I don't plan to say that. As far as I understand, you're simply – you're not going to necessarily quote, plead, not – you're not going to get up and say, we're guilty.

MR. MORGAN: Well, in the opening statement, perhaps that will be the appropriate time to tell the jury that at – I intend to call Mr. Crow and he's – I'm going to read count one and he is's going to say guilty. I'm going to read count two, and he is going to say guilty. I'm going to read count three, he's going to say guilty. I'm going to read count six, he's going to say guilty. So they know that in opening statement. I'm going to quote the indictment.

THE COURT: And, of course, as far as the Government's concerned, the Government has to put on – you call him after the Government's proof. So, you know, the – it seems to me that the statement is the Government has the burden of proof. The Government will put on their evidence but when we get on – we're telling you right now, we're going to – we're going to admit counts one, two, three and six. I mean –

MR. MORGAN: I did want to bring that up now.

THE COURT: Well, I think that's – that's proper to bring it up now. I think we might all fall off our chairs if [p. 40] you didn't warn us. So, I think that's proper. And I don't see anything improper with how you

plan to proceed. The Government has to make its proof anyway.

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APPENDIX VIII

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[p. 19] I guess the first thing I want to tell you with regard to counts one, two, three, and six you will hear Bill Crow himself say, "I'm guilty." As to those counts one, two, three, and six, you will have to find him guilty. So, what's obviously in issue then are counts four and five.

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APPENDIX IX

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[p. 150] Q. Now, let's just start with counts one, two, three and six, Mr. Crow. We'll go into detail later, but just to get it out now, with regard to count one, did you A K A VideoDom, knowingly ship in interstate commerce by means of it a [p. 151] computer, a visual depiction, the production of which involved the use of a minor engaging in sexually explicit conduct, and which visual depiction was of such conduct, to-wit: a computer file bearing the name PIC18.JPG which included an image of a prepubescent girl spreading her legs and using her hands to open her labia, or variant thereof?

A. Yes, I did.

Q. Are you pleading guilty to count one?

A. Yes, I am guilty.

Q. Showing a picture like that over the computer, over the Internet?

A. Yes, I am, and I'm very ashamed of it.

Q. Count two – by the way, count one, it says on or about August 8th. Is that correct?

A. Yes, I believe that's correct.

Q. Count two accuses you of on or about August 9th, 1996, of knowingly and unlawfully ship in interstate commerce by means of a computer, visual depictions, the production of which involved the use of minors engaging in sexually explicit conduct, and which visual depictions were of such conduct, to-wit: the following computer files

which included the images delineated below; which goes into numerous details of sexually explicit conduct. Did you, likewise, send these photographs over the computer Internet?

A. Yes, I did.

[p. 152] **Q.** Are you guilty of count two?

A. Yes, I am.

Q. In regard to count three, is it true that one or about September 10th, 1996, that you did knowingly, unlawfully, ship in interstate commerce by means of a computer, visual depictions, the production of which involved the use of minors engaging in sexually explicit conduct, and which visual depictions were of such conduct, to-wit: the following computer files which included the images delineated below; of which there are about eight more pictures?

A. Yes.

Q. Would you admit under oath you sent pictures on August 8th, August 9th, and September 10th of last year over the computer?

A. Yes.

Q. Now, count six. On or about September 30th, 1996, did you knowingly possess three or more books, magazines, periodicals, films, videotapes or other matter which contain visual depictions of minors engaging in sexually explicit conduct which had been mailed, shipped and transported interstate commerce and was produced using materials which had been shipped and transported in interstate commerce and the production of those visual

depictions involved the use of minors engaging in sexually explicit conduct, these depictions include but are not limited to; and gives three [p. 153] descriptions?

A. Yes.

Q. Did have some child pornography at home?

A. I –

Q. That's what count six – did you have three or more. Correct? That's correct, isn't it?

A. I believe it was in three trunk of my car.

Q. All right. I'm sorry. All right. I'm sorry. Is that true?

A. Yes.

Q. Okay. So, you admit – are you pleading guilty to counts one, two, three and six?

A. Yes, I am.

Q. Sending pictures over the computer and possessing some in your car?

A. Yes.

Q. Now, let's go back. Well, are you pleading not guilty to count four and court five?

A. I'm pleading not guilty to count four and count five.

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